

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EDC 4879

Student by her parent or guardian,)
Parent,)
)
Petitioner,)
)
v.)
)
Buncombe County Board of Education,)
)
Respondent.)

**FINAL DECISION
ORDER OF DISMISSAL**

THIS MATTER comes before the undersigned Administrative Law Judge, on Respondent's Objection to the Sufficiency of the Petition (Objection) and Motion to Dismiss filed on September 3, 2009. After reviewing Respondent's Objection, and the Petition, the Undersigned finds as follows:

1. Petitioners filed for a contested case hearing on August 27, 2009 on an Office of Administrative Hearings' form checking the block labeled other. Petitioner cites as fact(s) supporting her Petition that due to her child's disabilities "it is imperative that she (the child) gets off to school well-prepared and that the school staff has had plenty of time to prepare." She cites that it has been "a unilateral effort to prepare for *Student's* 3rd grade year." Petitioner has attached to the Petition (among other attachments) several pages of emails, including three addressed to Judge Selina Brooks with the Office of Administrative Hearings.

2. Respondent cites in its Objection and Motion that the Petitioner "has not provided any allegations that the Respondent failed to comply with federal or State laws nor has she provided any allegations that the Respondent violated the Student's IEP." Petitioner and Respondent were recently involved in a due process involving the same child which is now on appeal. Respondent cites in its present Objection and Motion that this Petition appears to be an "attempt to prevent a change of placement" based on "her appeal of Judge Brooks' decision in the first Due Process matter."

3. Petitioner's Petition cites as resolution or remedy sought that "the best remedy is to start with an IEP team not two separate parties," and that "an impartial mediator not paid by DPI could assist in developing the IEP teams comradorie (sic) needed in order to be legally referred to as an IEP Team that makes joint decisions." On the Petition, Petitioner states that "Clearly the remedy is to bring *Student* back to her school at WES." She goes on to state, "We are waiting."

STANDARD OF REVIEW

Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). When reviewing a motion to dismiss, the court assumes the facts alleged in the complaint (Petition) are true, *see McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325 (4th Cir. 1996), and construes the allegations in the light most favorable to the pleader (in this instance the Petitioner). *See Scheuer v. Rhodes*, 416 U.S. 232 (1974).

NOW THEREFORE, based on the above, the Undersigned concludes as follows:

CONCLUSIONS OF LAW

1. The Undersigned finds that the basis of dispute by Petitioner against Respondent, including a description of the nature of the problem(s) and facts relating to the problem(s); as well as the proposed resolution of the problem(s) are in insufficient, and fail to meet the requirements of Paragraph (b) of Section 300.508 of the Individuals with Disabilities Education Act (IDEA 2004) Regulations.

2. Moreover and of primary importance, Petitioner's present Petition centers around and focuses on issues and the outcome of a prior due process hearing which is on appeal at the present time. To those issues the doctrine of *res judicata* applies and cannot be re-heard at the Office of Administrative Hearings in a second due process hearing.

3. Issues of camaraderie which are no doubt important to Petitioner are outside the jurisdiction of the Office of Administrative Hearings.

4. In accordance with 34 CFR 300.507, a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law.

5. In accordance with N.C.G.S. § 115C-109.6., "Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition." The Office of Administrative Hearings lacks jurisdiction over issues occurring more than a year prior to filing of the Petition due to the statute of limitations.

FINAL DECISION

Based on the foregoing Conclusions of Law, the Undersigned allows Respondent's Motion to Dismiss. Disposition of this case by dismissal in accord with Chapter 3 of Title 26 of

the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33 and N.C. GEN. STAT. § 1A-1, Rule 12 of the North Carolina Rules of Civil Procedure, as well as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300, is proper and lawful. It is hereby **ORDERED** that this matter be **DISMISSED with prejudice**.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 8th day of September, 2009.

Augustus B. Elkins II
Administrative Law Judge